Supreme Court, U.S.
FILED
FEB 9 - 2011
OFFICE OF THE CLERK

No. 10-885

In The Supreme Court of the United States

ALEXIS WITT, ON BEHALF OF THE ESTATE OF DEAN WITT, DECEASED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF POINT MAN INTERNATIONAL MINISTRIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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February 9, 2011

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INTEREST OF THE *AMICUS CURIAE*[1]

Point Man International Ministries ("PMIM") is a faith based organization started in 1984 and run by veterans from all conflicts, nationalities and backgrounds. Although PMIM's primary purpose has always been to offer spiritual healing of Post Traumatic Stress Disorder ("PTSD"), PMIM today is involved in group meetings, publishing, hospital visits, conferences, supplying speakers for churches and veterans groups, welcome home projects and community support. PMIM began in Seattle, Washington, and has now developed into a system of small groups across the United States. All services offered by PMIM to veterans are free of charge.

SUMMARY OF ARGUMENT

Review should be granted and *Feres* should be overruled in its entirety. This brief argues three points in support of that proposition: (1) *Feres* was wrongly decided because the plain language of the

[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for the parties authored this brief in whole or in part, and no person or entity other than amicus curiae, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, Counsel of Record for the parties were notified at least 10 days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief, and their letters of consent are included with this filing.

FTCA controls, (2) the doctrine of *stare decisis* is outweighed by the inconsistent results engendered by *Feres*, and the absence of any legitimate reliance interest in its application, and (3) after ten years of continuous combat deployments, the longest in our country's history, our Armed Services need our Nation's support more than ever, including in the new access to justice that overruling *Feres* would bring.

ARGUMENT

I. *FERES* WAS WRONGLY DECIDED – THE FTCA'S PLAIN LANGUAGE CONTROLS

As the court of appeals in this case correctly observed, in "*Feres v. United States*, the Supreme Court established an exception to the FTCA's waiver of sovereign immunity 'for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.'" Memorandum Opinion, at 2 (reprinted at Petitioners App. 1a).

In a subsequent case considering that judicially established exception, *Johnson v. United States*, 481 U.S. 681 (1987), the rule announced in *Feres* was characterized, accurately it is submitted, as an "unauthorized rationalization gone wrong." 481 U.S. at 702 (Scalia, J. dissenting).

The *Feres* Court simply had no warrant – and as explained below, no reason – to create such an exception. The wording of the Federal Tort Claims Act

("FTCA"), 28 U.S.C. §§ 1346, 2671-2680, is unambiguous and clearly contradicts such an exception.

This was made plain in the *Johnson* dissent, 481 U.S. at 692-694 (*e.g.*, at 693: "Read as it is written, this language renders the United States liable to *all* persons [emphasis original], including servicemen, injured by the negligence of Government employees"), and perhaps even more remarkably, acknowledged in *Feres* itself. 340 U.S. at 138 ("We do not overlook considerations persuasive of liability in these cases") (reciting and discussing language of FTCA indicating servicemen may recover).

A first principle of statutory construction is that courts must not read into unambiguous legislation words that are not written. *E.g., Rubin v. United States*, 449 U.S. 424, 430 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances'") (citation omitted).

As Justice Scalia's dissenting opinion in *Johnson* forcefully and eloquently explains, the fundamental, core problem with the *Feres* doctrine is the Court did exactly that. *Johnson*, 481 U.S. at 692, 703 ("The problem now, as then, is that Congress not only failed to provide such an exemption, but quite plainly excluded it . . . because Johnson devoted his life to serving in his country's Armed Forces, the Court today limits his family to a fraction of the recovery they might otherwise have received. If our imposition of that sacrifice bore the legitimacy of having been

prescribed by the people's elected representatives, it would (insofar as we are permitted to inquire into such things), be just. But it has not been, and it is not. I respectfully dissent").

As the dissent also pointed out, the Court "realized seven years too late that '[t]here is no justification for this Court to read exemptions into the [FTCA] beyond those provided by Congress. If the [FTCA] is to be altered that is a function for the same body that adopted it." *Johnson*, 481 U.S. at 702 (Scalia, J. dissenting), quoting *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1957) (footnote omitted – first brackets by the Court).

Even more regrettable, as one commentator has recently observed, when the Court "promulgated the *Feres* doctrine it had several tools at hand, in the form of the Federal Tort Claims Act's enumerated exceptions," to prevent the now generally perceived greatest danger in allowing tort recovery, "intruding upon military decision making and discipline." Major Deirdre G. Brou, "Alternatives to the Judicially Promulgated *Feres* Doctrine," 192 MIL. L. REV. 1, 60 (Summer 2007); *cf., Johnson, supra*, 481 U.S. at 694 (Scalia, J. dissenting) ("Several years after *Feres* we thought of a fourth rationale: Congress could not have intended to permit suits for service-related injuries because they would unduly interfere with military discipline"), citing *United States v. Brown*, 348 U.S. 110, 112 (1954).

As Major Brou persuasively argues, there *is* no such danger to military discipline contained in the FTCA, if the text of the statute is only read correctly, as it is actually written.

Specifically, through "its cases interpreting the Federal Tort Claims Act's discretionary function exception, the Supreme Court has established a two-part test" to determine whether the exception "shield's the United States from suit for its employees' negligence." 192 MIL. L. REV. at 65.

"Courts can apply this two-part discretionary function test to protect the military's decision making process and its discipline." *Id.* at 66.

This thesis comports naturally both with Congress' overall purpose in the FTCA, and with this Court's interpretation of its exceptions.

These exceptions, including the discretionary function exception, "mark 'the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.'" *Molzof v. United States,* 502 U.S. 301, 311 (1992) (citation omitted). In them, "'Congress has taken steps to protect the Government from liability that would seriously handicap efficient government operations.'" *Id.* (citations omitted).

Indeed, illustrating the efficacy of Major Brou's thesis requires the addition of only one word to this Court's latest, essential statement of the discretionary

function's purpose: "the purpose of the exception is to 'prevent judicial second guessing of legislative and administrative decisions grounded in [*military*], social, economic, and political policy through the medium of an action in tort'". *United States v. Gaubert,* 499 U.S. 315, 323 (1991) (citation omitted – brackets and emphasis added).

As Major Brou explains, under the concept of "mission command, commanders provide subordinates with a mission, their commander's intent and concept of operations, and resources adequate to accomplish the mission. Higher commanders empower subordinates to make decisions within the commander's intent. They leave details of execution to their subordinates and require them to use initiative and judgment to accomplish the mission." Brou, *supra,* 192 MIL. L. REV. at 67 (citation omitted).

"This delegation of leadership authority concept permeates all areas of the military, not just combat operations. Military commanders at all levels possess great authority and discretion to train units, mete out military justice, and manage people." *Id.* (citations omitted).

"If applied to the military context, the Federal Tort Claims Act's enumerated exceptions, particularly the discretionary function exception, can protect this leadership concept from judicial second-guessing while also preserving service member's rights under the Act." Id. (emphasis added).

This one simple, but brilliant insight, and the many other reasons cited by Petitioner in this case, and many others before her, compel the conclusion that *Feres* was incorrectly decided.

This leaves only, it is submitted, the one question left unanswered in Justice Scalia's ringing dissent: "whether considerations of *stare decisis* should induce us, despite the plain error of the case, to leave bad enough alone." *Johnson, supra,* 481 U.S. at 703 (Scalia, J. dissenting).

II. THE DOCTRINE OF *STARE DECISIS* IS CLEARLY OUTWEIGHED

As phrased, Justice Scalia's question nearly answers itself, in the negative. The factors in deciding whether to adhere to the principle of *stare decisis* include "of course whether the decision was well reasoned." *Montejo v. Louisiana,* ___ U.S. ___, 129 S.Ct. 2079, 2089 (2009) (citation omitted). The dissenting opinion in *Johnson*, joined by three other members of this Court, shows thoroughly and compellingly that *Feres* was not well reasoned.

Furthermore, "the fact that a decision has proved 'unworkable' is a traditional ground for overruling it." *Id.* at 2088 (citation omitted).

And the Petitioner in this case has exhaustively shown why as a precedent *Feres* has proven unworkable. *See, Petition for Cert.,* filed January 7, 2011 at pp. 6-18 (detailing disparate tests developed and

multiple inconsistent, inequitable results reached by lower federal courts).

Another standard factor in determining the weight of *stare decisis* considerations are "the reliance interests at stake". *Montejo, supra,* 129 S.Ct. at 2089. Surely all can agree there is no legitimate reliance interest entailed in committing negligence that harms others. In other words, the government cannot credibly contend that it has legitimately relied upon *Feres* as establishing a right to commit torts with impunity. This factor too therefore weighs heavily against *stare decisis* and in favor of overruling *Feres.*

Moreover, an obvious corollary is that overruling *Feres* will give the government an incentive (and as discussed in the next section, a very timely one) *not* to commit negligence that harms members of our Armed Services.

A final *stare decisis* factor is "the antiquity of the precedent". *Montejo, supra,* 129 S.Ct. at 2089. And *Feres* was decided sixty-one years ago.

But to this, *amicus* would respond with what this Court has often said: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Nat. Bank & Trust Co.,* 335 U.S. 595, 600 (1949) (Frankfurter, J. dissenting) (later citations omitted).

III. THE ARMED SERVICES NEED OUR NATION'S SUPPORT NOW MORE THAN EVER

"For the second year in a row, the U.S. military has lost more troops to suicide than it has to combat in Iraq and Afghanistan" and the suicide rate is "an indication of the stress that military personnel live under after nearly a decade of war." John Donnelly, "More troops lost to suicide" (January 24, 2011), published online at http://www.congress.org/news/2011/01/24/more_troops_lost_to_suicide.

To illustrate this ongoing crisis, Congressman Rush D. Holt of New Jersey recounted the tragic story of one of his constituents, Coleman S. Bean, who "was an Army sergeant and Iraq War veteran who suffered from post-traumatic stress disorder but could not find treatment. He took his own life in 2008." Donnelly, *supra*.

Amicus PMIM is doing everything it can to support our service members, particularly in coping with the greater than ever incidence of PTSD among returning veterans. PMIM respectfully asks that this Court do its part too, by overruling and correcting the longstanding inequity of *Feres*.

This will provide greater access to justice for military personnel and their dependent families, thereby improving their morale, in the face of the many difficult challenges that undoubtedly still lie ahead.

"After all" the morale of a deceased serviceman's "comrades-in-arms will not likely be boosted by news that his widow and children will receive only a fraction of what they might have recovered" but for the *Feres* doctrine. *Johnson, supra,* 481 U.S. at 700 (Scalia, J. dissenting).

CONCLUSION

Review should be granted in this case, and *Feres* should be overruled in its entirety, allowing appropriate recovery to the family of SSgt. Dean Witt.

Respectfully submitted,

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February 9, 2011